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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1618

HERBERT MARTIN GIMELSTOB, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR REHEARING

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November 2, 1973

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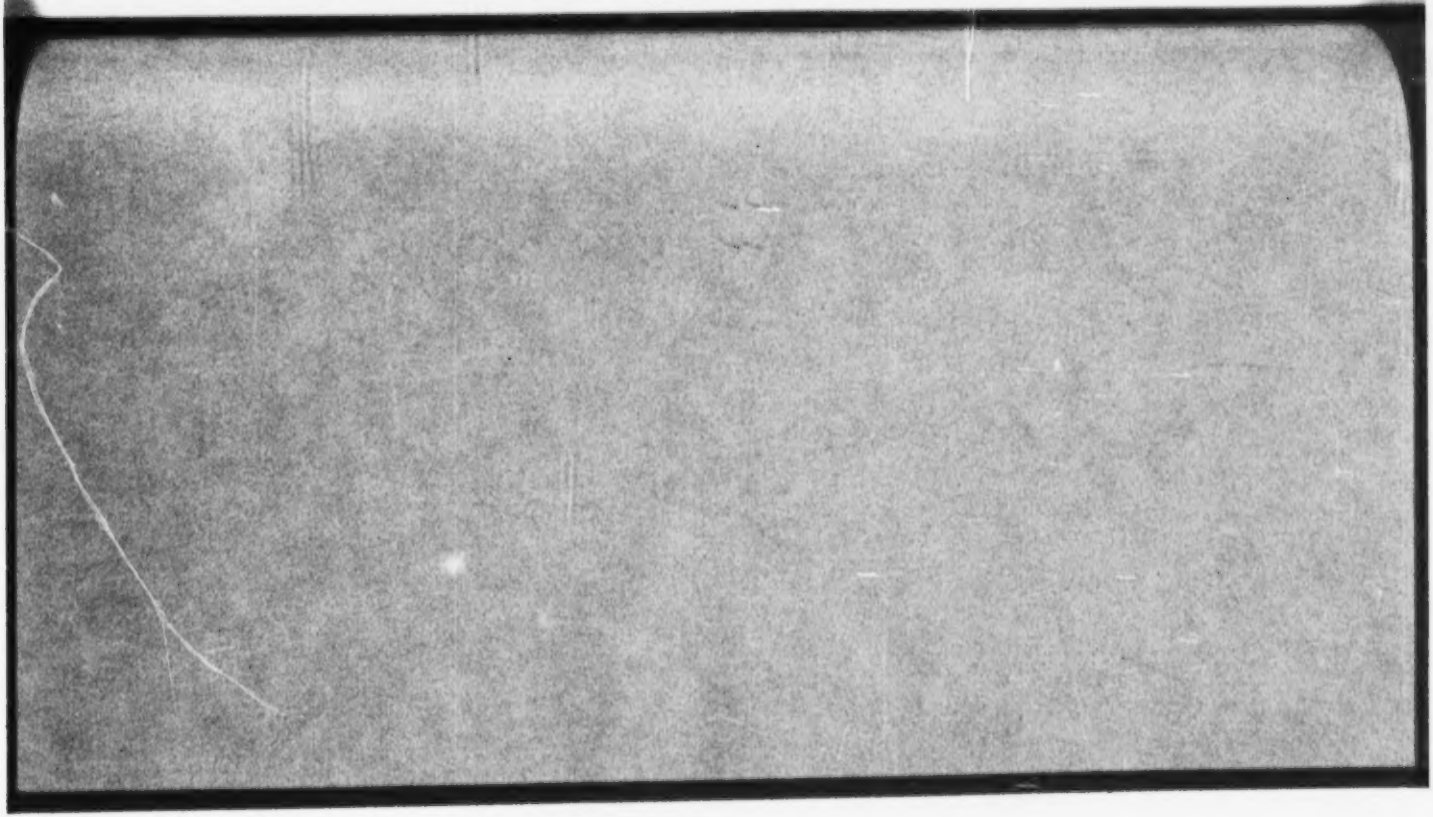

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PETITION FOR REHEARING

Pursuant to Rule 58(2), the petitioner respectfully moves this Court for an order (1) vacating its order denying the petition for writ of certiorari, entered on October 9, 1973, and (2) granting the petition for writ of certiorari. As grounds for this motion, petitioner states the following:

A. The Conceded Conflict as to 18 U.S.C. § 111

Section 111 of Title 18, U.S.C., punishes anyone who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any . . . [federal officer] while engaged in or on account of the performance of his official duties." The critical problem raised by the Petition for Writ of Certiorari (Question Presented No. 2) was whether in a trial for a violation of § 111 the Government must prove that the defendant had knowledge of the official status of the federal officer in a non-assault situation where no crime was involved. The petitioner here was charged solely with having impeded or interfered with an F.B.I. agent pursuing stolen items by maneuvering a car so as to slow down the F.B.I. agent's car—a traffic offense at most, since no touching of the agent or his car was involved.

The Solicitor General has conceded (Op. Br. 7) that "in certain situations where the defendant's conduct is apparently a reasonable response to the acts of the unidentified officer" or "where the charge is resisting arrest," a conflict exists among the Circuits as to whether *scienter* is material—i.e., whether the Government must prove that the defendant knew that he was interfering with a *federal* officer. Actually, the existing conflict is broader than that, *scienter* being required by some courts wherever the interference is of a non-assault or non-criminal variety. See Pet. Reply Br. 2.

It is important to the proper administration of federal criminal justice that this conflict be resolved, particularly in the context of a case that involves so obvious a non-assault traffic violation. It may well be, as was suggested to but not resolved by the Second Circuit in *United States* v. *McKenzie*, 409 F. 2d 983, 986 (2nd

Cir. 1969), "that § 111 is essentially a jurisdictional statute . . . [that] provides a federal forum for the common law crimes of assault and resisting arrest in cases where the victim is a federal officer." Traditionally, knowledge of the identity of the victim is not necessary to constitute the crime of assault. But where the applicability of a federal statute depends not upon such an assault having been committed but upon some non-criminal form of interference, the element of *scienter* may become critical to the applicability of federal jurisdiction. Then the focus of the federal crime is not the independent crime of assault but a non-criminal interference with a federal officer. But for the presence of a *federal* officer, no basis would exist for the exercise of federal criminal power. *Scienter* would thus seem essential in this situation.

As was said by this Court with respect to the federal Travel Act, *Rewis* v. *United States*, 401 U.S. 808, 812 (1971), an expansive application of § 111 "would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers [or, as in the instant situation, the federal status of an automobile driver], a matter of happenstance, would transform relatively minor state offenses into federal felonies." And certainly, in addition, any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis*, 401 U.S. at 812.

Moreover, § 111 in this context seeks to make a federal crime out of interference with a person having the "status" of a federal officer. Making "status" the fulcrum of any crime presents serious constitutional questions. See *Robinson* v. *California*, 370 U.S. 660 (1962), holding unconstitutional a state statute making

criminal the "status" of narcotics addiction. While "this Court has never articulated a general constitutional doctrine of *mens rea*," *Powell* v. *Texas*, 392 U.S. 514, 535 (1968, opinion of Marshall, J.), it may well be that *mens rea* should be engrafted upon § 111 in order to avoid any constitutional questions that might otherwise arise.

These considerations, not presented in the Petition for Writ of Certiorari, fully justify a reconsideration of the order denying certiorari.

B. The Other Questions Presented

The third Question Presented in the Petition dealt with the definition of the termination of foreign commerce, where the goods in transit had been unloaded from aboard ship, delivered to and warehoused by the one and only consignee, and weighed and broken into lots within the warehouse.

Here again, the decision below that the stealing of the imported tin occurred while it was still in foreign commerce, despite its having been delivered to the named consignee, constitutes a highly questionable expansion of a federal criminal statute (18 U.S.C. § 659) into an area generally reserved to state criminal law. Both the Petition and the Government's opposing brief demonstrate that no decision of this Court has dealt with § 659 in terms of the propriety of a free-wheeling expansion of the statute into state law areas. Indeed, a recent decision of the Seventh Circuit, rendered after the Petition was filed, has dramatically illustrated the tendency of lower courts to give such an expansionist interpretation to § 659. In *United States* v. *Parent*, Nos. 72-1419, 72-1504 and 72-1600.

rendered on July 18, 1973, the Seventh Circuit held that a manufacturer's mere intent to ship mini-bikes across state lines, coupled with preparatory steps for yielding possession of the goods, was sufficient to constitute them a "interstate shipment" for purposes of § 659.

While the *Parent* decision deals with the commencement of an interstate shipment rather than the termination of a foreign shipment, it does in combination with the decision below involve the federal courts in an entirely new and perhaps limitless arena of criminal litigation. Little more than the intent of a shipper or consignee, even though the goods remain at rest, seems to be enough to activate the criminal sanctions of § 659. Nothing in the legislative history justifies so broad an application. In fact, in 1966 Congress expressly amended § 659 to provide: "Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter . . ." Act of Oct. 14, 1966, 80 Stat. 904.

The judicial approach to § 659 that is consistent with Congress' intention is best expressed in *United States* v. *Altobella*, 442 F. 2d 310, 315 (7th Cir. 1971): "[T]here is nothing about the appellants' enterprise, as disclosed by the evidence, which suggests any reason why state police powers need to be supplemented by the federal government." To that end, the denial of certiorari in this case should be reconsidered.

Finally, petitioner renews and reiterates the first Question Presented, dealing with the failure of the trial judge to instruct the jury that the petitioner had been

acquitted of conspiracy at the end of the trial and that the highly prejudicial conspiracy evidence should not be considered by the jury in assessing petitioner's guilt under substantive counts. Nothing that the Solicitor General has said explains the failure of the trial judge thus to meet the standards promulgated by this Court in *Schaffer* v. *United States*, 362 U.S. 511 (1969). Nothing that the Solicitor General has said distinguishes the Second Circuit's *Patrisso* ruling, 262 F. 2d 194, which is virtually on all fours in terms of the facts and which is in direct conflict with the Third Circuit ruling below. That question, too, deserves reconsideration by this Court to the end that review thereof may be had.

CONCLUSION

For these reasons, rehearing should be granted, the order denying certiorari should be vacated and the Petition granted.

Respectfully submitted,

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Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

EUGENE GRESSMAN